

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

76-7247

United States Court of Appeals
FOR THE SECOND CIRCUIT

RUTH ANN REED, as Administratrix of the Estate of DAN
WILLIAM REED, deceased, and as parent, natural guardian,
and best friend of CYNTHIA ANN REED, DEBORA LYNN
REED and JULIE MARIE REED, all infants *et al.*,

Plaintiffs-Appellees,

v.

FORWOOD CLOUD WISER, JR., and RICHARD E. NEUMAN,

Defendants-Appellants.

PETITION FOR REHEARING OR
REHEARING IN BANC

KREINDLER & KREINDLER
Attorneys for Plaintiffs-Appellees
Office and P. O. Address
99 Park Avenue
New York, New York 10016
(212) 68-8181

of Counsel:

LEE S. KREINDLER
MILTON G. SINCOFF
STANLEY J. LEVY
MELVIN T. FRIEDMAN
JAMES D. VEACH

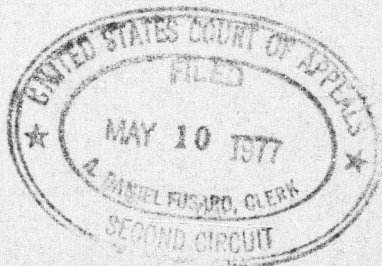


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To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Ruth Ann Reed, et al., the plaintiffs-appellees above-named, present this, their petition for a rehearing or a rehearing *in banc* in the above-entitled cause, and, in support thereof, respectfully show:

Statement

This action arises from the crash of a Trans World Airlines (TWA) Boeing 707 in the Ionian Sea on September 8, 1974. All 79 passengers and 9 crewmembers were killed in the crash.

Plaintiffs-appellees are the personal representatives of 9 passengers. The Appellees sought compensatory damages

from the defendants-appellants, employees of TWA, whose negligence was alleged to be a proximate cause of the crash. Appellants' Answer asserted as a defense the \$75,000 damages limit of the Warsaw Convention, as supplemented by the Montreal Agreement.

The Honorable Marvin E. Frankel, U.S.D.J., granted Appellees' motion to strike the said defense in an opinion reported at 414 F.Supp. 863. On appeal pursuant to 28 U.S.C. § 1292(b), this Court reversed and remanded with instructions to reinstate the defense.

In extending the Convention, which applies by its own clear language only to the carrier, to cover employees, the Court has committed error. For this reason appellees seek a rehearing, with argument, and further consideration of this issue. Failing that, a rehearing *in banc* should be granted because, as the Court stated, the issue is of "great importance to international air disaster litigation" (Slip Opinion at 3168).

POINT I

A rehearing should be granted because the panel opinion contains error.

The Panel erred with regard to a basic principle of civil law and gave a strained translation and interpretation of Warsaw. Additionally, it misconceived the reason why the appellees relied on this country's failure to adopt the Hague Protocol. Finally, the Panel ignored Second Circuit precedents under which protection of the carrier has been subordinated to the conflicting rights of passengers.

The Panel Misconstrued Civil Law

The Panel, relying on comments by delegates to conferences that took place after Warsaw was adopted, concluded that Article 22 would have the effect of limiting the liability of employees "in at least some [civil law] juris-

dictions" (Slip Opinion at 3172). But no civil law code provision or case is cited.

The civil law is, however, precisely the same as the common law with respect to the separate and distinct liability of employees and agents for their own acts. This fundamental civil law principle dates back to (1804) and stems from the Code Napoleon:

"Art. 1382. Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage.

"Art. 1383. Everyone is liable for the damage he causes not only by his acts, but also by his negligence or imprudence." Von Mehren, *THE CIVIL LAW SYSTEM*, p. 339 (1957).

See also German Civil Code, Art. 823; Swiss Code of Obligations, Ch. II, Art. 41; Soviet Civil Code: Law of Obligations, Ch. XII, Art. 403; Civil Code for the Mexican District and Territories, Ch. V, Art. 1910; Italian Civil Code, Title IX, Art. 2043.

Thus, the Panel erred in concluding that under civil law a carrier's personal defense necessarily inures to the benefit of its employees.

Article 24 Does Not Apply

Even as retranslated by the Panel, Article 24 merely refers back to Article 17 and says that any action *against the carrier*, however founded, is subject to Warsaw. The carrier, however, is not a party to this action.

Article 24 was only intended to have Warsaw apply regardless of whether actions were brought by passengers, heirs or personal representatives and whether the action sounded in contract, tort or quasi-contract. This is Professor Matte's* analysis of Article 24 and, based on that

* Matte, *TRAITÉ DE DROIT AERIEN—AERONAUTIQUE*, 422-23 (1964).

analysis, he concludes (translation follows the French):

"L'art. 24 de la Convention, dans ses deux alinéas, précise que les limitations prévues par la Convention, en ce qui concerne la responsabilité du transporteur, se réfèrent également, aux art. 17, 18 et 19 sans préjudice, quant à l'art. 17, de la détermination des personnes qui ont le droit d'agir, et de leurs droits respectifs. Ces stipulations ont comme but de garantir l'application uniforme de la Convention, quel que soit le plaignant (la personne contractante ou ses héritiers) (145) et quel que soit le droit d'action (contractuelle, délictuelle ou quasi-délictuelle) (146).

"Etant donné que la Convention ne règle que la responsabilité du transporteur dans les circonstances prévues par les arts. 17-19 (responsabilité contractuelle), il y a certaines situations où la Convention n'exclut pas d'autres actions:

"a) La Convention ne s'applique pas aux préposés (et substitués) du transporteur: les actions directes contre ces personnes ne sont pas soumises à la présomption de faute ou des limites de la responsabilité (147); . . ."

"Article 24 of the Convention, in its two paragraphs states that the limitations provided for by the Convention, so far as the liability of the carrier is concerned, pertain likewise to Articles 17, 18 and 19, without prejudice, with respect to Article 17, to the determination of the persons who have the right to act, and of their respective rights. These stipulations have the purpose of guaranteeing the uniform application of the Convention, regardless of who the plaintiff might be (the contracting party or his heirs) (145), and regardless of the right of action (contractual, or delinquent, or quasi-delinquent) (146).

"Since the Convention regulates only the liability of the carrier in the circumstances referred to in Articles

17-19 (contractual liability), there are certain situations in which the Convention does not exclude other actions:

"a) The Convention does not apply to the agents (and substitutes) of the carrier: direct actions against these persons are not subject to the presumption of fault or of the limits of liability (147): . . ."

The Panel, accordingly, erred in finding that Article 24 applied to suits brought against employees of the carrier.

The Panel Disregarded the Clear Language of the Treaty

The Panel opinion fails to give a satisfactory explanation for the fact that while Warsaw refers to "agents" (Articles 20(1), (2) and 25(2)), the provisions dealing with liability (Articles 17, 21 and 24) refer only to the carrier. The only reasonable explanation for this is that Warsaw only applies to the carrier. Appellees respectfully refer to their Brief on appeal, which analyzes Warsaw's pertinent provisions in greater depth.

The Hague Protocol

It is true that this country's refusal to adopt the Hague Protocol, wherein Warsaw was extended to cover employees, was primarily due to its failure to increase Warsaw's liability limits sufficiently. But this fails to come to grips with the fact that Hague, which accomplishes the extension, is not law in this country. Cf. *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965). The Panel erred by treating Article 25A of the Hague as if it were law in this country.

By its decision to carry out what it considers to be a fundamental purpose of Warsaw—protection of the car-

rier—the Panel has judicially extended a United States Treaty. This is, however, a function of other branches of our government.

Protection of Passengers

Protection of passengers is a legitimate concern, which this Court has furthered in the past. *Lisi v. Alitalia Linee Aeree, S.p.A.*, 370 F.2d 508 (2 Cir. 1966), *aff'd by a divided Court*, 390 U.S. 455 (1968); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965). *It should do so now.*

This Court has also declared statutory limits on death action damages to be “anachronistic.” *Rosenthal v. Warren*, 475 F.2d 438, 446 (2d Cir. 1973), *cert. denied*, 414 U.S. 856 (1974). The Warsaw-Montreal limit is no less so. The Court should, therefore, refuse to extend Warsaw’s protection beyond the carrier, the only party that the drafters intended to protect.

POINT II

This case should be reheard *in banc*.

The Panel opinion states that the question before it was “novel” (at 3166) and is of “great importance to international air disaster litigation” (at 3168). The rights of millions of American citizens who fly aboard international carriers are affected. Whether airline employees are entitled to assert Warsaw’s liability limitations as a defense is also a question of first impression at the federal appellate level. For these reasons, this case clearly comes within Rule 35(a)(2) of the Federal Rules of Appellate Procedure and should be heard by the full Court.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this Petition for Rehearing or Rehearing *in banc* be granted; that reargument be ordered or recon-

sideration be given to the question before the Court; and that the Opinion-Order of the District Court be, upon further consideration, affirmed.

Respectfully submitted,

KREINDLER & KREINDLER
Attorneys for Plaintiffs-Appellees
Office and P.O. Address
99 Park Avenue
New York, New York 10016
(212) 687-8181

of Counsel:

LEE S. KREINDLER
MILTON G. SINOFF
STANLEY J. LEVY
MELVIN I. FRIEDMAN
JAMES D. VEACH

(61477)

United States Court of Appeals
For the Second Circuit

Ruth Ann e Reed, as Administratrix , etc.,
of Dan William Reed, etc.,
Plaintiffs-Appellees
Reed Forwood Cloud Weiser, Jr.,
and Richard E. Neuman, Defendants-Appellants

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,

COUNTY OF New York , ss:

Bernard S. Greenberg

being duly sworn,

deposes and says that he is over the age of 21 years and resides at
162 East 7th Street, New York, N.Y.

That on the 10th day of May 1977 at
99 14 Wall Street, New York, N.Y.
he served the annexed Petition for Rehearing upon
Bigham, Englar, Jones & Houston Attorneys for Defendants-Appellants
in this action, by delivering to and leaving with said Bigham, Englar, Jones &
Houston two true copies thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the
person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 10th

day of May 1977 }

Bernard S. Greenberg

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1979